IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
THOMAS G. BERNDSEN,	)	**Supreme Court #SC86342**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Facts Underlying Disciplinary Case

Respondent Thomas Berndsen represented a client named Cynthia McNeil, formerly Cynthia Franke, in the modification of child custody matter styled *William E. Franke v. Cynthia J. McNeil*, Cause No. 548552. The case was filed in the Circuit Court of St. Louis County. **App. 27 (T. 98-99), 43**. Attorney Thomas Osterholt represented William E. Franke, the petitioner in the child custody matter. **App. 6 (T. 16)**. By April of 1997, *Franke v. McNeil* had been pending for some time and was scheduled to go to trial on April 22, 1997. **App. 11 (T. 36), 78**. The litigation had been acrimonious. **App. 11 (T. 35), 27 (T. 99)**.

On April 3, 1997, Mr. Berndsen was taking the deposition of William Franke. **App. 7 (T. 18), 27 (T. 100)**. The deposition was being videotaped as well as transcribed. **App. 20 (T. 69)**. A dispute arose during the deposition as to the then current location of one of the litigants' daughters. **App. 52-60**. Mr. Osterholt stopped the deposition. **App. 16 (T. 54-55), 53, 58**. Much dispute ensued among Mr. Berndsen, Mr. Osterholt, and the litigants, at the time the deposition was stopped on April 3, as to who knew what, and when it was known, regarding the daughter's then current whereabouts. **App. 52-60**. The dispute was videotaped and transcribed by the technicians there to memorialize the deposition.

After the deposition was ended by Mr. Osterholt, his client, Mr. Franke, asked Mr. Osterholt to contact the deposition's videographer to make sure that the videotape would

not be edited. Mr. Franke told Mr. Osterholt that he wanted to make sure that the comments Mr. Berndsen had made during the dispute at the end of the deposition were preserved on the record. **App. 9 (T. 25)**. In response to that request from his client, Mr. Osterholt telephoned the owner of the company that taped the deposition, Christy O'Brien, to verify with her that nothing would be deleted from the videotape. **App. 8-9 (T. 24-25), 71-73**. Mr. Osterholt recalls that he made this telephone call to Ms. O'Brien the day after the Franke deposition was interrupted, and that the conversation lasted two or three minutes. **App. 8 (T. 24)**. Mr. Osterholt had no other conversations with Ms. O'Brien between that two to three minute call and the call he made to her after Mr. Berndsen faxed a motion for protective order to him on April 14, 1997. **App. 9 (T. 26)**. Mr. Osterholt never suggested editing the videotape to Ms. O'Brien. **App. 9 (T. 27)**. Ms. O'Brien does not recall contacting Mr. Berndsen after receiving the call from Mr. Osterholt; it does not sound like something she would do. **App. 23 (T. 81)**.

According to Mr. Berndsen, he received a telephone call on April 14, 1997, from someone who identified him or herself as being with the company that videotaped Mr. Franke's deposition. **App. 29 (T. 107-108)**. The caller, according to Mr. Berndsen, told him that he better be careful and that Mr. Osterholt had contacted the caller about editing the videotape of Mr. Franke's deposition. **App. 29 (T. 108)**. Mr. Berndsen does not recall whether the caller was male or female. **App. 30 (T. 109)**. He does not think he made any notes about the call. **App. 37 (T. 137)**. He does not recall whether the caller said he or she was with the company that recorded the deposition or the company that videotaped the deposition. **App. 38 (T. 143)**.

After allegedly getting that call, Mr. Berndsen decided he had to take action to preserve the record for his client, Mrs. McNeil. **App. 30 (T. 110), 37 (T. 138)**. Mr. Berndsen suspected that Mr. Franke and/or Mr. Osterholt would be motivated to delete parts of the videotape because Mr. Berndsen believed that Mr. Osterholt and Mr. Franke contradicted themselves during the dispute at the end of the deposition regarding whether they truly did not know where the daughter was. **App. 30 (T. 112)**.

On the afternoon of April 14, 1997, Mr. Berndsen prepared a Motion for Protective Order and Notice of Hearing, in which he stated that:

> Respondent has learned that petitioner's attorney has contacted the videotape technician who recorded Petitioner's deposition and asked to edit portions of the videotape of Petitioner's deposition.

App. 49. The Notice, which was part of the Motion for Protective Order, stated that the motion "shall be called for hearing . . . on Tuesday, April 15, 1997." **App. 50**.

On that same day, April 14, 1997, at 2:55 p.m., Mr. Berndsen faxed the motion and notice to Mr. Osterholt at his office. **App. 30 (T. 109, 112), 34 (T. 127)**. Mr. Berndsen did not file the motion with the court. **App. 34 (T. 128)**. Mr. Berndsen did not communicate with Mr. Osterholt about the allegation in the motion before drafting and faxing the motion and notice to Mr. Osterholt. **App. 37 (T. 137)**. He did not call Mr. Osterholt to discuss the matter before preparing and faxing the motion due to prior acrimonious events and animosity that had arisen during the case. **App. 31 (T. 113-114), 37 (T. 137)**.

On receiving the faxed motion the afternoon of April 14, Mr. Osterholt assumed the motion had been filed with the court and would be heard the next morning. There were other motions already noticed to be heard in the case that morning. **App. 7-8 (T. 20-22)**. Mr. Osterholt was anxious to refute what he felt was an attack on his professional ethics. **App. 8 (T. 21), 9 (T. 27-28)**.

On the afternoon of the 14th, after receiving Mr. Berndsen's motion, Mr. Osterholt contacted Ms. O'Brien. Ms. O'Brien owned the company and was the supervisor of the technician who videotaped Mr. Franke's deposition. Mr. Osterholt subpoenaed Ms. O'Brien to appear for the hearing the next morning, because he knew that her testimony would disprove the allegation that Mr. Osterholt had "asked to edit portions of the videotape." **App. 8 (T. 21-23), 49**.

Mr. Osterholt does not remember discussing the motion with Mr. Berndsen before the hearing started on April 15. **App. 12 (T. 37)**. Mr. Osterholt is emphatic that he was not told and had no reason to believe that Mr. Berndsen had not already filed the motion for protective order with the court, or that Mr. Berndsen had decided not to file the motion. **App. 8 (T. 22), 9 (T. 28), 10 (T. 32), 17 (T. 57-59)**.

Conversely, Mr. Berndsen recalls meeting with Mr. Osterholt prior to the convening of the hearing on April 15. He recalls Mr. Osterholt introducing Ms. O'Brien to him and explaining why she was there. Mr. Berndsen insists he told Mr. Osterholt before the hearing started that he had not filed the motion and would not file the motion. **App. 31-32 (T. 115-117)**.

On the morning of the 15th, after some preliminary issues had been discussed with the Judge, Mr. Osterholt stated he had "two witnesses here because a couple of motions cry out for testimony because they are very serious." **App. 69**. Then the following exchange occurred:

> Mr. Osterholt: Well, I would like to take up actually Mr. Berndsen's motion if you could find it. It's a Motion for Protective Order and Notice of Hearing which he faxed to me yesterday. Would you see if you can find that in the file. If not, I'll give you mine.
>
> Mr. Berndsen: Judge, it has not been filed with the Court so you don't have it yet, but I filed three motions, I believe, and so they are my motions, and I would like to address them first.

App. 69. Following these statements, Mr. Osterholt put Ms. O'Brien on the stand and elicited testimony from her that Mr. Osterholt had not contacted the video technician who taped Mr. Franke's deposition, and that his only contact with her had been to get assurance that there would be no editing of the Franke videotape. Mr. Berndsen declined the opportunity to ask Ms. O'Brien any questions. **App. 70-75**.

After providing some narrative testimony himself refuting any claim that he had attempted to have the tape edited, Mr. Osterholt asked the Judge to require Mr. Berndsen to put on evidence to support his motion. **App. 75-76**. The Judge then asked Mr. Berndsen: "Well, Counsel, if I understand this correctly, you haven't even filed this with the Court?" After Mr. Berndsen confirmed that the motion had not been filed, the Judge

stated that since the motion had not been filed the Court would make no rulings on it and would not require Mr. Berndsen to make any statement about it. **App. 76**.

The custody dispute styled *Franke v. McNeil* concluded before July of 2001, which is when a complaint was filed against Mr. Berndsen. **App. 6 (T. 13-14, 16), 33 (T. 122)**.

Disciplinary Background and Procedural History of the Disciplinary Case

Mr. Franke, through his attorney Mr. Osterholt, filed a voluminous complaint against Mr. Berndsen in July of 2001. **App. 4 (T. 5-6), 6 (T. 16), 33 (T. 122)**. A file was opened and assigned to a Region X Disciplinary Committee. After a lengthy review, **App. 4 (T. 6)**, the committee found probable cause to believe Respondent had violated Rule 4-8.4(d) and issued an admonition to Respondent for violation of that Rule. **App. 4 (T. 6)**. Respondent rejected the admonition. **App. 90-94**. In accordance with Rule 5.11(b), an information charging Respondent with violation of Rule 4-8.4(d) was thereafter prepared and filed against Respondent. **App. 95-96**.

The matter was heard before a Disciplinary Hearing Panel on July 30, 2004. Two of the three panel members joined in a decision issued on August 12, 2004. The majority concluded that Respondent violated Rule 4-8.4(d) by faxing Mr. Osterholt the Motion for Protective Order and Notice of Hearing for the improper purpose of harassing, annoying, intimidating, and embarrassing him, regardless of whether Respondent actually filed the motion or not. **App. 103**. The majority decision recommended that the Court issue Mr. Berndsen a public reprimand. **App. 99-104**. One Panel member dissented from that

decision, concluding that because Mr. Berndsen never actually filed the motion for protective order, he did not violate Rule 4-8.4(d). **App. 106-107**. Mr. Berndsen did not concur in the recommendation of a public reprimand, so the record was filed with the Court pursuant to Rule 5.19(d).

Mr. Berndsen practices in the St. Louis area and has no prior disciplinary history.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HE ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE (RULE 4-8.4(d)) IN THAT HE PREPARED AND SENT TO OPPOSING COUNSEL A MOTION FOR PROTECTIVE ORDER CONTAINING A SERIOUS ALLEGATION AGAINST OPPOSING COUNSEL WHEN HE HAD LITTLE OR NO BASIS FOR MAKING THE ALLEGATION, THEN DID NOT FILE THE MOTION, AND INSTEAD ALLOWED THE MOTION TO GO FORWARD THE NEXT MORNING WITHOUT CLARIFYING TO THE COURT OR OPPOSING COUNSEL THAT HE NOT ONLY HAD NOT FILED THE MOTION, BUT HAD DECIDED NOT TO DO SO.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-8.4(d)

In re Snyder, 35 S.W.3d 380 (Mo. banc 2000)

In re Waldron, 790 S.W.2d 456 (Mo. banc 1990)

In re Carey & Danis, 89 S.W.3d 477 (Mo. banc 2002)

In re Kopf, 767 S.W.2d 20 (Mo. banc 1989)

ARGUMENT

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HE ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE (RULE 4-8.4(d)) IN THAT HE PREPARED AND SENT TO OPPOSING COUNSEL A MOTION FOR PROTECTIVE ORDER CONTAINING A SERIOUS ALLEGATION AGAINST OPPOSING COUNSEL WHEN HE HAD LITTLE OR NO BASIS FOR MAKING THE ALLEGATION, THEN DID NOT FILE THE MOTION, AND INSTEAD ALLOWED THE MOTION TO GO FORWARD THE NEXT MORNING WITHOUT CLARIFYING TO THE COURT OR OPPOSING COUNSEL THAT HE NOT ONLY HAD NOT FILED THE MOTION, BUT HAD DECIDED NOT TO DO SO.

Mr. Berndsen's conduct on the afternoon of April 14 and morning of April 15 does not pass the "smell test." This Court, of course, reviews the evidence de novo, makes its own determination as to the credibility of witnesses and the weight to give the evidence, and draws its own conclusions of law. *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000) (per curiam). Two of the three hearing panel members made a factual finding that Mr. Berndsen's testimony regarding the receipt of the phone call on April 14 "lacks all credibility." **App. 102**. The dissenting panel member found that "someone contacted

Respondent to advise him that the Complainant . . . had contacted the videographer about the editing of the tape." **App. 106**. If the Court agrees with the majority of the panel on this issue of Respondent's credibility, then Respondent's misconduct is all the clearer. See *In re Waldron*, 790 S.W.2d 456, 461 (Mo. banc 1990) (respondent's lack of veracity with respect to any aspect of the disciplinary proceeding taints his credibility with respect to the entire proceeding). But even assuming that the Court finds that Respondent did get a telephone call on the afternoon of the 14th from some unnamed individual whose sex Mr. Berndsen cannot even identify, Respondent's conduct thereafter was prejudicial to the administration of justice for the following reasons.

Mr. Berndsen authored a motion praying that a circuit court judge "enjoin and prohibit" Mr. Franke and his attorneys from attempting to "edit or change any videotape or other testimony in this case," based on the allegation that "Petitioner's attorney has contacted the videotape technician who recorded Petitioner's deposition and asked to edit portions of the videotape." Even giving Mr. Berndsen the benefit of the doubt as to whether, at some point, he got a warning telephone call raising an issue about the integrity of the deposition videotape, that call was a mighty slender, indeed, wholly insufficient, basis for a motion accusing his opponents of altering evidence. Mr. Berndsen acknowledged in his hearing testimony that he could recall making no notes of the telephone call, did not know who the caller was, and could not even identify the caller as male or female. He made no effort to substantiate the alleged caller's information, which he could easily have done by calling the videography company to check the veracity of the caller's information or by contacting opposing counsel to get his reaction

to the alleged call. Under these circumstances, to accuse opposing counsel of the overt act of contacting a third party and affirmatively asking the third party to alter evidence, and to make that allegation in a pleading that opposing counsel had no reason to believe had not been filed in court, was conduct prejudicial to the administration of justice.

Even more objectionable, perhaps, than authoring the motion and faxing it to opposing counsel was Mr. Berndsen's conduct at the courthouse the next morning. If, as Mr. Berndsen testified at the hearing, he plainly told Mr. Osterholt before the hearing started that he had not filed the motion and would not file it, then why did Mr. Berndsen stand mute when Mr. Osterholt, understandably upset, brought up the motion to the judge and asked to put on witnesses to refute it. When Mr. Osterholt raised the subject of the motion, Mr. Berndsen stated: "Judge, it has not been filed with the Court so you don't have it yet . . . ." That response is a far cry from the one Mr. Berndsen would reasonably have been expected to make if one is to believe his version of events. All Mr. Berndsen need have said to the Judge at that point was that he had indeed drafted and faxed a motion to Mr. Osterholt, but that he had not filed the motion with the court and had since decided not to file it with the court, so there was no need for the court to take up the matter. Instead of clearly disposing of the issue with that simple clarification, Mr. Berndsen instead stated the motion had not been filed, so the judge did not have it yet. Then, Mr. Berndsen stood mute while Mr. Osterholt called Ms. O'Brien to the stand and elicited testimony from her. He likewise stood by mute while Mr. Osterholt himself gave sworn testimony to refute the allegation that had so alarmed him. Mr. Berndsen's silence, under the circumstances, was conduct prejudicial to the administration of justice.

In voting to impose discipline against Respondent, the disciplinary committee and the majority of the disciplinary hearing panel necessarily concluded that Mr. Berndsen's conduct was outside of accepted norms and conventions of practice. The committee initially issued an admonition to Respondent for his conduct, which Mr. Berndsen rejected. The majority of the panel recommended a public reprimand, a recommendation with which the chief disciplinary counsel concurs. See *In re Carey & Danis*, 89 S.W.3d 477, 502 (Mo. banc 2002) (reprimand may be appropriate when breach of discipline does not involve dishonest, fraudulent, or deceitful conduct).

A case for short term suspension could even be made by reference to Standard 6.22 of the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), which encompasses "knowing" violations of duties lawyers owe to the legal system. That case is not made here for several reasons. First, little or no harm to clients resulted from the misconduct. *In re Kopf*, 767 S.W.2d 20, 23 (Mo. banc 1989) (while breach of duty should not be trivialized, record evidences minimal client harm). And, Respondent has no prior disciplinary history, a mitigating factor recognized in the Standards.

On taking the oath to become a licensed officer of Missouri's courts, every lawyer solemnly swears to "abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause." Mr. Berndsen as much as admitted the lack of merit in his motion by not filing it. Faxing it to Mr. Osterholt, then standing mutely by while Mr. Osterholt adduced testimony to refute what he understandably believed was a pending allegation prejudicial to his and his client's honor and reputation, was conduct prejudicial to the administration

of justice. The Court should issue a public reprimand to Mr. Berndsen for his misconduct.

CONCLUSION

Lawyers must maintain high standards of professionalism to preserve the integrity of the courts and profession. Mr. Berndsen's conduct with regard to the motion for protective order fell far short of the standards the Court should expect from its officers. Respondent violated Rule 4-8.4(d), for which he should receive a reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2004, two copies of Informant's Brief have been sent via First Class mail to:

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Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06b);

3. Contains 3,435 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

APPENDIX